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NORTHERN DIST. OF TX
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DESMOND EVERETT,

Plaintiff,

v.

CONN APPLIANCES, INC.

Defendant.

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Civil Action No. _____

8-19CV-2369 M

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Desmond Everett sues Defendant Conn Appliances, Inc. and alleges:

Introduction

1. This is an action alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA").
2. The TCPA was enacted to prevent companies like Defendant from invading American citizens' privacy and to prevent abusive "robocalls."
3. The TCPA's sponsor, Senator Hollings, urged Congress to pass the TCPA stating, "[t]hese machines are out of control, and their use is growing by 30 percent every year. It is telephone terrorism, and it has got to stop." 137 Cong. Rec. at S16205. Describing the specific consumer interests the TCPA was intended to protect, Senator Hollings said: "I echo Supreme Court Justice Louis Brandeis, who wrote 100 years ago that 'the right to be left alone is the most comprehensive of rights and the one most valued by civilized man.'" *Id.*
4. "Senator Hollings presumably intended to give telephone subscribers another option: telling the auto-dialers to simply stop calling." *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1256 (11th Cir. 2014).

5. Yet, still today, according to the Federal Communications Commission (FCC), “Unwanted calls are far and away the biggest consumer complaint to the FCC with over 200,000 complaints each year – around 60 percent of all the complaints [the FCC] receive[d]. Some private analyses estimate that U.S. consumers received approximately 2.4 billion robocalls per month in 2016.” <https://www.fcc.gov/about-fcc/fcc-initiatives/fccs-push-combat-robocalls-spoofing>.

6. As the Seventh Circuit Court of Appeals wrote: “No one can deny the legitimacy of the state’s goal: Preventing the phone (at home or in one’s pocket) from frequently ringing with unwanted calls. Every call uses some of the phone owner’s time and mental energy, both of which are precious.” *Patriotic Veterans v. Zoeller*, 845 F.3d 303, 305-06 (7th Cir. 2017).

7. Defendant repeatedly made unsolicited calls to Plaintiff’s cellular telephone, after Plaintiff demanded the calls stop, in violation of the TCPA. Defendant made at least 500 unauthorized and illegal calls to Plaintiff’s cell phones using an automatic telephone dialing system (“ATDS”) (including a predictive dialer) or pre-recorded voice for the purpose of bullying Plaintiff into filling out a credit application to purchase goods from Conn.

Jurisdiction, Venue and Parties

8. This Court has original jurisdiction over Plaintiff’s claims arising under the TCPA pursuant to 28 U.S.C. § 1331.

9. This Court has personal jurisdiction over Defendant as it is a domestic corporation, formed under the laws of Texas, with its principal place of business located at 2445 Technology Forest Boulevard, Suite 800, The Woodlands, Texas 77381-5258.

10. Venus is appropriate in the United States District Court for the Northern District of Texas, Dallas Division, pursuant to 28 U.S.C. § 1391, as the events giving rise to Plaintiff's claims occurred in Forney, Kaufman County, Texas.

11. Plaintiff is a natural person, and citizen of the State of Texas, residing in Forney, Kaufman County, Texas.

12. Plaintiff is the "called party." *See Breslow v. Wells Fargo Bank, N.A.*, 755 F.3d 1265 (11th Cir. 2014) and *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014).

General Allegations

13. Defendant called Plaintiff from its automatic telephone dialing system over 500 times, without Plaintiff's consent, in an attempt to bully Plaintiff into filling out a credit application.

14. A large volume and frequency of calls is indicative the calls were made from an ATDS. *See, e.g., Cummings v. Rushmore Loan Mgmt. Serv.*, No. 8:17-cv-1652-T-33MAP, 2017 U.S. Dist. LEXIS 177619, at *2 (M.D. Fla. Oct. 26, 2017) (explaining that a large number and frequency of calls is indicative of an ATDS).

15. Defendant's automatic telephone dialing system dials numbers automatically from a list of numbers, with no human intervention involved at the time of dialing, and is an ATDS as defined by the TCPA and the Federal Communications Commission's (FCC's) 2003 Order regarding the TCPA. *See In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14092 (2003); *Ammons v. Ally Fin., Inc.*, 326 F. Supp. 3d 578 (M.D. Tenn. 2018); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018).

16. In addition, Defendant called Plaintiff in Broadcast mode using both an artificial voice and pre-recorded messages as defined by the TCPA.

17. In Broadcast mode, the system automatically calls customers with no human being involved at the time of dialing. If a customer answers a call made in Broadcast mode, he will be automatically connected to an artificial voice message through an IVR (interactive voice response). In Broadcast mode Defendant also has the option of leaving a pre-recorded message for the called party if it detects a voice mailbox.

18. The use of an artificial or prerecorded voice is indicative of an automatic telephone dialing system. *See, e.g., Cummings v. Rushmore Loan Mgmt. Serv.*, No. 8:17-cv-1652-T-33MAP, 2017 U.S. Dist. LEXIS 177619, at *2 (M.D. Fla. Oct. 26, 2017) (explaining that a the use of an artificial or prerecorded voice during the call is indicative of an ATDS); *France v. DiTech Fin., LLC*, No. 8:17-cv-3038-T-24MAP, 2018 U.S. Dist. LEXIS 58711, at *19-20 (M.D. Fla. Apr. 6, 2018) (same).

19. Defendant also used its dialing system to call Plaintiff's cell phone number in Predictive mode.

20. In Predictive mode (which Defendant now calls "system assisted mode", a term created for purposes of litigation and completely absent from any of Defendant's policies and procedures) the dialing system automatically calls customers with no human being involved at the time of dialing. If a customer answers a call made in this mode, the system will automatically transfer that call to an available agent who will field the call.

21. Sometimes, when Plaintiff answered Defendant's calls to his phone, there was a pause before he was connected to a live agent.

22. A pause in the phone call before being connected to a live agent is indicative of an automatic telephone dialing system. *See, e.g., Cummings v. Rushmore Loan Mgmt. Serv.*, No. 8:17-cv-1652-T-33MAP, 2017 U.S. Dist. LEXIS 177619, at *2 (M.D. Fla. Oct. 26, 2017)

(explaining that a pause before a live person comes on the line is indicative of an ATDS); *France v. DiTech Fin., LLC*, No. 8:17-cv-3038-T-24MAP, 2018 U.S. Dist. LEXIS 58711, at *19-20 (M.D. Fla. Apr. 6, 2018) (same).

23. At the time of dialing, agents fielding Broadcast or Predictive mode calls do not know what numbers are being dialed by the system, as the computer is randomly or sequentially dialing numbers without human intervention.

24. The only time an agent is aware a customer has been called is if that customer answers and is automatically transferred to the agent. At that time, the customer's demographic information automatically populates on the agent's computer screen. Prior to this, agents have no idea who the system is auto-dialing.

25. Plaintiff also received "abandoned calls" from Defendant.

26. Abandoned calls occur when Defendant's automated system calls more customers than Defendant has agents available to field the calls. As a result, a customer who answers hears nothing but dead air, as the automatic telephone dialing system has no human being available to transfer the call it dialed to.

27. Hearing dead air due to an abandoned call is indicative of the use of an ATDS. *See De Los Santos v. Millward Brown, Inc.*, 2014 U.S. Dist. LEXIS 88711, 2014 WL 2938605, at *3 (S.D. Fla. June 30, 2014) ("Plaintiff provides additional facts, such as hearing 'dead air,' a signature of autodialing.") (citing FCC, Consumer Guide: Unwanted Telephone Marketing Calls 2 (2013), <http://www.fcc.gov/cgb/consumerfacts/tcpa.pdf> ("The use of autodialers ... often results in abandoned calls-hang-ups or 'dead air.'")); *Gulisano v. Cambece Law Office, PC*, No. 15-81378-CIV-DIMITROULEAS/S, 2016 U.S. Dist. LEXIS 184129, at *9 (S.D. Fla. Aug. 8, 2016) (same).

28. Sometimes when Defendant called Plaintiff, the area code appeared to be from the local Dallas-Fort Worth area, such as (214) or (817).

29. Calling consumers using numbers beginning with the same area code as the consumer (or area code “spoofing”) is indicative of the use of an ATDS. *See Cunningham v. Greenstar Capital Sols., LLC*, No. 4:18-CV-000161-ALM-CAN, 2018 U.S. Dist. LEXIS 163086, at *11 (E.D. Tex. Aug. 1, 2018) (finding allegation of local area code spoofing used to trick consumers into answering phone calls to be indicative of an ATDS).

30. In total, Defendant uses its ATDS to make over 600,000 outbound calls per day.

31. Plaintiff is the subscriber, regular user, and carrier of the cellular telephone number (214)***-2110. Plaintiff was the called party and recipient of Defendant’s calls.

32. Defendant placed hundreds of automated calls to Plaintiff’s cellular telephone number (214) ***-2110 in an attempt to harass Plaintiff into filling out a credit application.

33. In or about January 2018, Plaintiff acquiesced and filled out a credit application with Defendant’s financing company Progressive Leasing, LLC just so Defendant would stop harassing him with automated phone calls.

34. On January 9, 2018, Plaintiff received correspondence from Progressive Leasing, LLC, indicating that his credit application (Ref # 10118791) had been “Denied.”

35. Even after Defendant denied Plaintiff’s credit application, Defendant continued to harass Plaintiff with multiple automated calls.

36. On several occasions since Defendant’s campaign of harassing automated calls began, Plaintiff instructed Defendant’s agents to stop calling his aforementioned cellular telephone number.

37. Unfortunately, no matter how many times Plaintiff asked for the calls to stop, Defendant continued to harass Plaintiff by bombarding his cell phone with automated calls.

38. Defendant had no legitimate purpose in calling Plaintiff, especially after Plaintiff requested that the calls stop. Rather, Defendant displayed a pattern of behavior that can only be described as an intentional and willful attempt to harass and abuse Plaintiff.

39. Plaintiff first demanded that the calls to his cellular telephone stop around January 2018. Specifically, Plaintiff stated "Please stop calling me."

40. Despite this clear and unequivocal request for the calls to stop, Defendant continued to bombard Plaintiff's cellular telephone number with automated calls dialed by its automatic telephone dialing system that same day and every day following it.

41. Plaintiff demanded that the calls to his phone stop on several additional occasions, but Defendant continued calling Plaintiff anyway. Plaintiff's numerous verbal requests for the harassment to end were ignored.

42. Defendant's policies and procedures regarding TCPA compliance are entirely toothless and are created simply for purposes of litigation. In reality, Defendant's agents and compliance teams ignore do not call requests from customers and allow those customers to be harassed by non-stop automated calls.

43. In reality, Defendant has a corporate policy to use its automatic telephone dialing system and pre-recorded or artificial voice calls to harass and intimidate individuals like Plaintiff.

44. Defendant has been sued for violating the TCPA hundreds of times by consumers all across the country.

45. Defendant has admitted in legal documents filed with the United States Securities and Exchange Commission that it utilizes a Noble Systems Predictive Dialer, which is a significant component of an automatic telephone dialing system.

46. Not one of Defendant's telephone calls placed to Plaintiff were for "emergency purposes" as specified in 47 U.S.C. § 227(b)(1)(A).

47. Defendant willfully or knowingly violated the TCPA with respect to Plaintiff as to each call made to Plaintiff's cell phone after the first call, as Defendant never had any initial consent to call Plaintiff's cell phone.

48. From each and every call Defendant placed to Plaintiff's cellular telephone without express consent, Plaintiff suffered the injury of invasion of privacy and the intrusion upon his right of seclusion.

49. Defendant's non-stop calls drained Plaintiff's cell phone battery and occupied its ability to receive other calls.

50. Defendant's non-stop calls wasted Plaintiff's time.

51. Plaintiff was also affected in a personal and individualized way by anger, stress, worry, frustration, embarrassment, and emotional distress.

COUNT I
(Violation of the TCPA)

52. Plaintiff fully incorporates and re-alleges paragraphs 1 through 51 as if fully set forth herein.

53. Defendant willfully violated the TCPA with respect to Plaintiff, specifically for each of the auto-dialer calls made to Plaintiff's cellular telephone after Plaintiff notified Defendant that Plaintiff wished for the calls to stop.

54. Despite Plaintiff demanding that the calls stop on multiple occasions, Defendant continued its pattern of harassment and abuse, and made it clear to Plaintiff that Defendant would call from its automatic telephone dialing system as often as it liked.

55. There is no way to describe Defendant's violation of the law other than willful or knowing. As a result, Plaintiff should be awarded treble damages of \$1,500 per violation for the harassment and abuse Defendant put him through.

56. Defendant repeatedly placed non-emergency telephone calls to Plaintiff's cellular telephone using an automatic telephone dialing system or prerecorded or artificial voice without Plaintiff's prior express consent in violation of federal law, including 47 U.S.C § 227(b)(1)(A)(iii).

WHEREFORE, Plaintiff respectfully demands a jury trial on all issues so triable, judgment against Conn Appliances, Inc. for statutory damages of \$500 per violation, actual damages, treble damages of \$1,500 per call, enjoinder from further violations of these parts, and any other such relief the Court may deem just and proper.

Respectfully submitted,

s/ Sharon K. Campbell

Sharon K. Campbell

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LCrouch@ForThePeople.com

Attorneys for Plaintiff

CIVIL COVER SHEET

8-19CV-2369M

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

DESMOND EVERETT,

(b) County of Residence of First Listed Plaintiff Kaufman

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Sharon K. Campbell, Esq.
3500 Oak Lawn Avenue, Suite 205
Dallas, TX 75219

DEFENDANTS

PROGRESSIVE LEASING, LLC

Conn's Appliances, Inc.

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

OCT - 7 2019

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

47 U.S.C. § 227 et seq

Brief description of cause:

Viol of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

/s/ Sharon K. Campbell, Esq.

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____